9-24-2013

State v. Booth Appellant's Reply Brief Dckt. 39574

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TREVOR JAMES BOOTH, Defendant-Appellant.	)	NO. 39574 CANYON COUNTY NO. CR 2005-1658 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Trevor Booth pled guilty to a single count of second degree murder. He received a unified sentence of life, with 20 years fixed. On appeal, Mr. Booth asserts that the district court abused its sentencing discretion, as his sentence is excessive given any view of the facts.

In response, the State has raised an additional issue—the threshold question of whether Mr. Booth's appeal should be dismissed based on an appellate waiver in his plea agreement. In addition, it argues that Mr. Booth's sentence is not excessive.

The present reply brief is necessary to address both of the State's arguments. With regard to the question of whether the appeal should be dismissed, Mr. Booth contends that the State's arguments are misplaced. In light of *Oneida v. Oneida*, 95 Idaho 105 (1972), if the State wished to seek dismissal of Mr. Booth's appeal, it should have filed a proper motion at the appropriate time. Having failed to do so, the State forfeited its right to invoke any appellate waivers appearing in the plea agreement.

With regard to the question of whether Mr. Booth's sentence is excessive, the State's arguments are largely unremarkable and, therefore, little response is necessary. However, because certain of the State's arguments are illogical, some additional comments are warranted.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously articulated in Mr. Booth's Appellant's Brief and, therefore, are not repeated herein.

ISSUES

In his Appellant's Brief, Mr. Booth identified a single issue on appeal:

> Did the district court abuse its sentencing discretion by imposing upon Mr. Booth a sentence which is excessive given any view of the facts?

In its Respondent's Brief though, the State has asserted an additional issue for this Court's consideration:

> Should this Court reject Booth's claim that the state may not seek to dismiss an appeal based on an appellate waiver unless it does so "prior to the filing of appellate briefing" and dismiss Booth's appeal since he knowingly and voluntarily waived his right to appeal as part of his plea agreement?

(Respondent's Brief, p.5.)

ARGUMENT

I.

By Failing To File A Proper Motion At An Appropriate Time, The State Forfeited Its Chance To Seek Dismissal Of Mr. Booth's Appeal Based On Any Appellate Waivers In The Plea Agreement

In his Appellant's Brief, Mr. Booth pointed out that "as part of the plea agreement, Mr. Booth agreed to waive his rights to: seek a sentence reduction under Idaho Criminal Rule 35; file an appeal; or seek post-conviction relief." (Appellant's Brief, p.3 n.2.) However, he then argued that, "Insofar as the State attempts to invoke Mr. Booth's appellate waiver to seek dismissal of this appeal, Mr. Booth asserts that the State has missed its opportunity to do so." (*Id.*) This argument was based on *Oneida v. Oneida*, 95 Idaho 105 (1972), wherein the Idaho Supreme Court held that the respondent in an appeal must file a motion to dismiss, *prior to the filing of the appellate briefing*, if it hopes to obtain dismissal of the appellant's appeal based on a waiver of appellate rights. (*See id.*)

In its Respondent's Brief, the State argues strenuously that *Oneida* should not apply and that, in fact, this Court can, and should, dismiss Mr. Booth's appeal even though the State failed to properly move for dismissal prior to filing of the appellate briefs. (*See* Respondent's Brief, pp.6-15.) For the reasons set forth below, the State's arguments are unpersuasive.

First, the State suggests that simply because Mr. Booth's plea was knowingly and voluntarily entered, the appellate waiver contained in the plea agreement can be invoked at any time. (*See* Respondent's Brief, pp.7-9.) Any such argument, however, misses the mark. The question of whether Mr. Booth's plea was knowingly, intelligently, and voluntarily entered was never raised below or on appeal by Mr. Booth, and is

therefore a non-issue for purposes of this appeal.[1] The only relevant question—highlighted by Mr. Booth in his Appellant's Brief, and elaborated upon by the State in its Respondent's Brief—is whether, even assuming the validity of the plea, the State can seek to invoke an appellate waiver after the Appellant's Brief has been filed. This is a simple matter of appellate procedure, not unlike the many appellate procedures the State routinely uses to preclude judicial scrutiny of arguments made by defendant-appellants (for example, rules concerning preservation of issues, rules requiring an appellant's claim to be supported by both argument and authority, or rules prohibiting an appellant from raising an issue on reply (or on review) that was not raised in the opening brief). As such, this issue has absolutely nothing to do with the question of whether Mr. Booth's plea was valid.

Second, the State points out that in previous cases Idaho's appellate courts have "considered *after* briefing whether a criminal defendant waived his right to appeal as part of his plea agreement," and it chides Mr. Booth for failing to cite any of those cases in his opening brief. (Respondent's Brief, p.10 (emphasis added).) The State's implication, of course, is that if Idaho's appellate courts have considered the effects of appellate waivers *after* briefing, there can be no requirement that the respondent file a motion to dismiss *prior to* filing of the appellate briefing. This argument fails as well. In a footnote omitted from the State's block-quotation of *Oneida* (*see* Respondent's Brief, p.11), the Supreme Court specifically recognized that, in appropriate cases, it may be prudent to hold off on dismissing an appeal in response to the respondent's motion,

[1] By declining to challenge the plea in this appeal, Mr. Booth is by no means conceding that his plea was knowingly, intelligently, or voluntarily entered. As noted, the validity of the plea is simply not at issue here.

pending thorough consideration of the issue in light of the parties' briefs and oral arguments: "An appellate court may deny such a motion but nevertheless dismiss the appeal after briefing and argument." *Oneida*, 95 Idaho at 107, n.2. Thus, the fact that in the cases cited by the State there was consideration of the respective appellate waiver provisions in no way undermines *Oneida's* requirement that if the respondent wishes to seek dismissal of an appeal based on a purported appellate waiver, it is incumbent upon the respondent to file a motion to dismiss in advance of the filing of the appellate briefs.

Furthermore, in none of the cases cited by the State is there any indication that the appellant sought to invoke the protections of the *Oneida* rule. *See State v. Straub*, 153 Idaho 882, 885-86 (2012); *State v. Cope*, 142 Idaho 492, 495-97 (2006); State *v. Murphy*, 125 Idaho 456, 456-57 (1994); *State v. Hansen*, 2012 WL 6634131, *1-2 (Ct. App. Dec. 19, 2012) (rev. granted); *State v. Rodriguez*, 142 Idaho 786, 787 (Ct. App. 2006); *State v. Allen*, 143 Idaho 267, 270 (Ct. App. 2006); *State v. Holdaway*, 130 Idaho 482, 484 & n.1 (Ct. App. 1997). Thus, the fact that those cases involved consideration of the respective appellate waivers, even after the cases were briefed, in no way undermines the *Oneida* rule.

Third, the State attempts to distinguish the facts of this case from those of *Oneida* by asserting that "*Oneida* involved a stipulation that the parties would proceed to 'move into the next part of the case' rather than pursue an interlocutory appeal," and, therefore, that case "did not involve an appeal waiver." (Respondent's Brief, p.11 (*quoting Oneida*, 95 Idaho at 106).) The attempted distinction is unavailing. The stipulation at issue in *Oneida* was an agreement on the part of the would-be appellant

that the order at issue was not an appealable order and, therefore, no appeal would be taken. *See Oneida*, 95 Idaho at 106. In substance, therefore, it is no different from the appellate waiver appearing in the plea agreement in this case. Indeed, in *Oneida*, the Supreme Court specifically described the stipulation at issue—which the State now argues "did not involve an appeal waiver" (Respondent's Brief, p.11)—as "the alleged waiver of the right to appeal." *Oneida*, 95 Idaho at 107.

Fourth, the State attempts to distinguish the facts of this case from those of *Oneida* by pointing out that in this case "the waiver . . . involves a plea agreement relating to the disposition of the entire case," whereas in *Oneida* the claimed waiver was the waiver of the right to seek an *interlocutory* appeal. (Respondent's Brief, p.11.) This distinction is immaterial though. Certainly, the *Oneida* Court did not limit its rule to interlocutory appeals. *See Onedia*, 95 Idaho at 106-07. Indeed, it would have been unreasonable to have done so. Regardless of whether the appeal is an interlocutory appeal or an appeal from a final judgment, the concerns of the *Oneida* Court are equally founded; in either case, it is unfair to allow the respondent to wait until the appellant has expended the time and expense of preparing an opening brief before invoking the alleged appellate waiver.

Fifth, the State claims that *Oneida* does not require that the respondent file a motion to dismiss the appeal prior to filing of the appellate briefing, only that the respondent seek dismissal at "the earliest stage of appellate proceedings," a time period which the State argues is not well-defined. (Respondent's Brief, p.12.) The State's contention defies common sense. Whatever ambiguity may inhere in the language quoted by the State (and Mr. Booth submits that there is none), one thing that is

abundantly clear is that the respondent's brief is most certainly not the "the earliest stage of appellate proceedings." *See Oneida*, 95 Idaho at 106 ("Having failed to move to dismiss the appeal, the respondents are in no position to rely, in their appellate brief, upon the alleged waiver of the right to appeal."). This is particularly true in a case such as this one, where the State was not only on notice of all of the relevant facts, but actually attempted to prevent Mr. Booth from having the present appeal based on the waiver provision in the plea agreement (although it made its filings in the wrong court—the district court). (*See* R., pp.67-68 (State's objection to Mr. Booth's notice of appeal), pp.72-73 (State's motion to strike appointment of Mr. Booth's appellate counsel).)[2]

Sixth, the State suggests that requiring the respondent to file a dismissal motion prior to any briefing being filed would be impractical because the transcripts and record are necessary for consideration of any such motion. (Respondent's Brief, p.12.) This argument is without merit. Although cases may be slightly different based on differences in the waiver provisions appearing in the respective plea agreements, generally, the State will be required to provide little more than a copy of the relevant plea agreement. Indeed, since Mr. Booth filed his Appellant's Brief in this case and thereby alerted the State to *Oneida's* requirement that there be a pre-briefing motion to

[2] Because the district court lacked the authority to remove Mr. Booth's appellate counsel from the case, *see* I.A.R. 13(c) (enumerating the limited powers of a district court during pendency of an appeal and omitting any reference to the power to quash the previous appointment of appellate counsel); I.A.R. 45 ("Appellate counsel may withdraw as the attorney of record for a party in a civil or criminal appeal only by order of the Supreme Court upon motion showing good cause."), or to dismiss the appeal (*compare* I.A.R. 13(c) (enumerating the limited powers of a district court during pendency of an appeal and omitting any reference to the power to dismiss the appeal) *with* I.A.R. 32(a) (expressly allowing the Supreme Court to dismiss an appeal involuntarily), the State's attempts to terminate the present appeal should have been directed to the Idaho Supreme Court.

dismiss if the State wishes to seek dismissal of an appeal based upon a purported appellate waiver in a plea agreement, it has filed motions to dismiss in a number of cases and it appears that most of those motions have been successful.[3]

Seventh, the State contends that, to the extent that *Oneida* controls this case, it should now be overruled. (Respondent's Brief, pp.13-15.) The State first asserts that "*Oneida* provides no compelling reason to require the state to" file a motion to dismiss the appeal prior to the filing of the briefs. (Respondent's Brief, p.13.) That is not true at all though. The Supreme Court clearly explained in *Oneida* that the purpose of requiring a pre-briefing motion from the respondent is to "spare the appellant further useless expenditures (for, e. g., an appeal bond, transcripts, and additional attorneys' fees)." *Oneida*, 95 Idaho at 106. Certainly, preserving the parties' (and the justice system's own) scarce resources is a compelling reason that is not manifestly wrong, and is neither unwise nor unjust.[4]

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[3] Although not in the record in this case, this Court can certainly take judicial notice of the Supreme Court's files in *State v. Harrington*, No. 41101 (State's motion to dismiss appeal, based on defendant's alleged waiver of appellate rights, currently pending), *State v. Mohr*, No. 41089 (State's motion to dismiss appeal, based on defendant's alleged waiver of appellate rights, *granted*; appeal dismissed), *State v. Mingo*, No. 41083 (State's motion to dismiss appeal, based on defendant's alleged waiver of appellate rights, *granted*; appeal dismissed), and *State v. Loman*, No. 41074 (State's motion to dismiss appeal, based on defendant's late-filed notice of appeal, *granted*; appeal dismissed).

[4] The State complains that Mr. Booth's reliance on a cost-savings rationale is "ironic," given that he is indigent. (Respondent's Brief, p.14 n.5.) To the extent that the State thinks Mr. Booth ought to be excepted from the *Oneida* rule because he is less wealthy than other litigants, the State has failed to consider the Fourteenth Amendment's requirement that Idaho not discriminate on the basis of indigency. *See Griffin v. Illinois*, 351 U.S. 12, 16-19 (1956). On the other hand, if it is the State's contention that the rationale of *Oneida* does not stand up in cases involving indigent defendants, the State is simply wrong. Whether the costs discussed in *Oneida* are borne by the individual appellant or, in the case of an indigent criminal defendant-appellant, by Idaho's taxpayers, the simple fact is that it is a waste of resources to allow the respondent,

Next, the State backpedals on its claim that "*Oneida* provides no compelling reason to require the state to" file a motion to dismiss the appeal prior to the filing of the briefs, recognizing that *Oneida* does provide such a reason but arguing that the goal of conserving resources "will not necessarily" be accomplished in every case. (*See* Respondent's Brief, p.13.) This argument is not compelling though. As noted above, when the Supreme Court decided *Oneida* it knew very well that not *every* motion to dismiss would be able to be disposed of on a pre-briefing motion, *see Oneida*, 95 Idaho at 107 n.2; however, it obviously reasoned that most such motions can be. Indeed, that has proven to be the case since, as discussed above, since Mr. Booth filed his Appellant's Brief in this case, the State has already had success in moving for the dismissal of appeals wherein criminal defendants had waived their appellate rights as part of their plea agreements.

Eighth, the State makes a naked appeal for this Court to ignore the *Oneida* rule because it believes it is entitled to the benefit of its bargain.[5] (*See* Respondent's Brief, pp.14-15 & n.5.) Whether the State is morally entitled to relief is simply not the issue though. *Oneida* imposes a simple procedural requirement upon the State: if it wishes to seek dismissal of an appeal based on a purported appellate waiver in a plea agreement,

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which knows full well that it has an argument that the appeal should be dismissed based on a purported appellate waiver, to rest on its laurels until such time as the appellant (or the taxpayers) has expended significant time and expense in preparing an appellate brief, before seeking a dismissal of the appeal.

[5] The State goes so far as to assert that it is "disingenuous" for Mr. Booth to invoke the *Oneida* rule, given that, in the State's view, Mr. Booth is a bad actor for filing an appeal after agreeing to waive his appeals. (Respondent's Brief, p.14 n.5.) By parity of reasoning, whenever the State seeks to invoke a procedural bar (whether it be based on lack of preservation or any other ground) to appellate consideration of a convicted man's claim, the State is "disingenuous"—not only if it turns out his claim has merit, but if he says his claim has merit.

it must file a motion to dismiss prior to the appellant's filing of his opening brief. This rule is clear and, under this rule, the State missed its chance to receive the benefit of its bargain. It is certainly not this Court's job, or even this Court's right, to bend or ignore the law in order to cover for errors made by counsel for the State.

In light of all of the foregoing, Mr. Booth respectfully submits that this Court should reach the merits of his sentencing-related claim.

II.

The District Court Abused Its Sentencing Discretion By Imposing Upon Mr. Booth A Sentence Which Is Excessive Given Any View Of The Facts

In his Appellant's Brief, Mr. Booth argued that, given the unique facts and circumstances of this case, the sentence imposed by the district court (life, with 20 years fixed), is excessive. (*See* Appellant's Brief, pp.4-21.)

The State has offered very little response and, by and large, that response is unremarkable and, therefore, requires no reply. (*See* Respondent's Brief, pp.15-18.) However, the State presents a handful or arguments which, because they are so patently illogical, call for a brief reply.

First, the State contends that Mr. Booth cannot be genuine in his expressions of remorse because he has made "attacks on [Mr. Kellum's] character . . . ." (Respondent's Brief, p.17 (citing Appellant's Brief, pp.9-11).) This claim is absurd. Initially, Mr. Booth did not, by any stretch of the imagination, "attack" Mr. Kellum's character; he merely discussed the evidence bearing on the circumstances of his crime. (*See* Appellant's Brief, pp.9-11.) To the extent that that evidence is not flattering to

Mr. Kellum's legacy, that is simply an inconvenience that the State will have to deal with. More importantly though, there is nothing inconsistent about highlighting the mitigating circumstances of the offense (namely, Mr. Booth's very real, albeit irrational, fear of Mr. Kellum), while also accepting responsibility for that offense and expressing heartfelt remorse for the actions taken and the outcome suffered.

Second, the State asserts that Mr. "Booth's 'acceptance of responsibility' argument is undercut by the fact that he has pursued this appeal that he expressly waived . . . ." (Respondent's Brief, p.17.) Again, the State's argument is absurd. Accepting responsibility means owning up to one's crimes and accepting an appropriate punishment; it does not mean accepting *any* punishment, even an excessive one. *See, e.g., State v. Shideler*, 103 Idaho 593, 595 (1982) (finding that the defendant accepted responsibility for his actions even though he pursued an appeal).

Third, the State suggests that Mr. Booth "agreed to waive his right to appeal in an effort to gain favor with the district court only to file an appeal when that concession was not adequate to gain him the sentence he wanted." (Respondent's Brief, p.17.) However, there is absolutely no evidence to support such a suggestion. Further, as was pointed out in Mr. Booth's Appellant's Brief (p.18), it is unlikely that Mr. Booth was trying to "game the system," as he is young and inexperienced with the criminal justice system.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Trevor Booth respectfully requests that this Court reduce his sentence.

DATED this 24th day of September, 2013.

ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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